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The Law of Presumptions: A Look at Confusion, Kentucky Style

By ROBERT G. LAWSON*

I. INTRODUCTION

Professor Wigmore's attempt to explain the law of presumptions and burden of proof was preceded by an observation most appropriate to the problem:

The difficulties of such an attempt, almost insuperable, arise not so much from the intrinsic complication or uncertainty of the situation as from the lamentable ambiguity of phrase and confusion of terminology under which our law has so long suffered.¹

Stimulation for this statement was probably more associated with presumptions than burden of proof. Over the years the term "presumption" has been used by virtually all courts to "designate what are more accurately termed inferences or substantive rules of law."² It has also been used as a "loose synonym for presumption of fact, presumption of law, rebuttable presumption, and irrebuttable presumption."³ To this list the Kentucky Court of Appeals had added mandatory presumption, presumptive evidence, and prima facie case. Perhaps of more significance than the indiscriminate use of terminology is the extent to which courts have used "presumptions" to describe judicial reasoning of various kinds and to perform chores more appropriate to unrelated procedural devices. As a result of the misuse of this concept, its real utility has been immersed in almost hopeless confusion. In this article, an effort is made to demonstrate this confusion as it exists in Kentucky and, by doing so, to provide a framework within which presumptions can be made to perform the rather simple functions for which they were created. Essential to this effort as a matter of background

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¹ 9 J. WIGMORE, EVIDENCE § 2485 (3d ed. 1940) [hereinafter cited as WIGMORE].

² Subrin, *Presumptions and Their Treatment Under the Law of Ohio*, 26 OHIO ST. L.J. 175, 176 (1965).

³ *Id.*

is a thorough discussion of the burden of proof concept to which the next two parts of the article are devoted.

II. BURDEN OF PROOF—CIVIL LITIGATION

A. Introduction

Adopting Wigmore's analysis, the Court of Appeals has divided burden of proof into two distinct responsibilities related to the process of persuasion:

The term 'burden of proof' is used commonly as applying to two kinds of situations. First, the risk of nonpersuasion; second, the duty of going forward with evidence.⁴

In civil litigation, the second responsibility is more significant than the first. It requires that sufficient evidence be introduced to persuade the trial judge that there exist factual issues in the case worthy of a jury's consideration. Until this is accomplished, one of the litigants must operate under threat of a premature termination of litigation by way of a directed verdict. Describing the quantity of proof necessary to satisfy this responsibility has proven to be among the most difficult problems encountered by courts in applying the burden of proof concept. An examination of the Kentucky cases involving this problem serves to demonstrate the hopeless manner in which lawyers frequently struggle to rise above word ritual.

In the very early cases, the standard used to determine whether the duty of going forward with evidence had been satisfied was stated as follows: "[W]here there is any evidence to sustain an issue the question is for the jury."⁵ The inadequacy of this standard becomes apparent when considered in light of the purpose for which the "duty of going forward" was created. As stated by Wigmore, this aspect of the burden of proof was developed to enable the judge, "as a part of his function in administering the law . . . to keep the jury within the bounds of reasonable action."⁶ Ful-

⁴ *Galloway Motor Co. v. Huffman's Adm'r*, 281 Ky. 841, 851, 137 S.W.2d 379, 384 (1940).

⁵ *Anderson Mfg. Co. v. Iring Transfer Co.*, 248 Ky. 91, 100, 58 S.W.2d 254, 258 (1933). *Accord, e.g.*, *Marz v. Hess*, 19 Ky. L. Rptr. 42, 39 S.W. 249 (1897); *Lingenfelter v. Louisville & N.R.R.*, 9 Ky. L. Rptr. 116, 4 S.W. 185 (1887); *Nichols v. Chesapeake, O. & S.W.R.R.*, 8 Ky. L. Rptr. 519, 2 S.W. 181 (1886).

⁶ 9 WIGMORE § 2487.

fillment of this objective would not be possible should "any evidence" be sufficient to sustain a jury's decision on a disputed issue. In recognition of this, the Court of Appeals, in its later cases, attempted to rephrase its standard of measurement to more accurately represent the power of a trial judge to pass initially upon the proof. Evidence sufficient to create a jury issue was defined as "testimony of substance and relevant consequence; not vague or uncertain, but having the quality of proof or fitness to induce conviction of truth."⁷ These words supposedly conveyed to the minds of trial judges and lawyers the quantity of evidence necessary to establish a jury issue. Perhaps they did. But Locke's observation would likely have been that "words, being voluntary signs, . . . cannot be voluntary signs imposed by [man] on things he knows not. That would be to make them signs of nothing, sounds without signification."⁸

To further complicate the task of a trial judge, the Court of Appeals developed, concurrent with the above standard, the principle that a directed verdict could be avoided simply by introducing a "mere scintilla of evidence."⁹ In applying this principle, the Court at first reverted back to the original standard of measurement by stating that "an issue should be submitted to the jury where there is *any evidence*, even though slight, tending to sustain it."¹⁰ Then, as had been done before, the principle was restated to reflect a greater power in the trial judge to take a case from the jury. In this restatement, evidence under the scintilla rule was defined as "something of substance, and not mere vague, uncertain, or irrelevant matter, not carrying the quality of proof, or having fitness to induce conviction."¹¹ As an encore to this act, the Court of Appeals abandoned this

⁷ *Louisville & N.R.R., v. Lefever's Adm'x*, 288 Ky. 195, 200, 155 S.W.2d 845, 847 (1941). *Accord*, *Clark v. Young's Ex'x*, 146 Ky. 377, 142 S.W. 1032 (1912).

⁸ J. LOCKE, *An Essay Concerning Human Understanding* 9 (Ann. by A. C. Fraser 1959).

⁹ *E.g.*, *Sympton Bros. Coal Co. v. Coomes*, 248 Ky. 324, 58 S.W.2d 594 (1933); *Stanley's Adm'r v. Duvin Coal Co.*, 237 Ky. 813, 36 S.W.2d 630 (1931); *American Dist. Tel. Co. v. Oldham*, 148 Ky. 320, 146 S.W. 764 (1912); *Bannon v. P. Bannon Sewer Pipe Co.*, 136 Ky. 556, 119 S.W. 1170 (1909).

¹⁰ *Kentucky Util. Co. v. Wiggins*, 254 Ky. 629, 636, 72 S.W.2d 12, 15 (1934).

¹¹ *Newman v. Dixon Bank & Trust Co.*, 205 Ky. 31, 36, 265 S.W. 456, 458 (1924). *Accord, e.g.*, *Wynn v. Gover*, 268 Ky. 562, 105 S.W.2d 636 (1937); *Duff v. May*, 245 Ky. 709, 54 S.W.2d 4 (1932); *Park Cir. & Realty Co. v. Ringo's Guardian*, 242 Ky. 255, 46 S.W.2d 106 (1932).

standard of measurement altogether: "[A] mere scintilla of evidence is not sufficient to take a case to the jury."¹²

However, efforts to provide a yardstick for this purpose continued. In recent years, the Court has ruled at one time or another that a jury must be given an opportunity to decide an issue if the proof on that issue could be described as "evidence of substance,"¹³ "evidence of probative value,"¹⁴ or evidence which "substantially tends to support a cause of action."¹⁵ But the measurement now used most frequently in passing judgment upon the validity of a directed verdict is contained in this statement:

[W]hen we find a verdict to be *flagrantly against the weight of the evidence*, the complaining party is entitled to a directed verdict.¹⁶ (Emphasis added).

To be "flagrantly against the [weight of] the evidence," a verdict must be "so unsupported by proof and so overwhelmingly contradicted as to force the conclusion that it was the result of passion and prejudice on the part of the jury."¹⁷ This standard possibly provides an intelligible guide with which trial judges can perform their task. More probably, along with its forerunners, it indicates that the Court is groping for words to define that which is nearly indefinable. In either event, the end result of the Court's total effort to describe the role of the burden of going forward with evidence is literally hundreds of confusing and uncertain judicial opinions.

The one characteristic common to all the above standards is that each is framed, although somewhat obscurely, in terms of a quantity of evidence. None is framed in terms of a degree of mental conviction. Yet, in passing upon the sufficiency of proof, the

¹² Coney Island Co. v. Brown, 290 Ky. 750, 755, 162 S.W.2d 785, 788 (1942). Accord, e.g., Faulkes v. Brummett's Adm'r, 305 Ky. 434, 204 S.W.2d 493 (1947); Morehead & N.F.Ry. v. Crawford, 296 Ky. 636, 178 S.W.2d 14 (1944); Cloversplint Coal Co. v. Blair, 287 Ky. 158, 151 S.W.2d 1052 (1941); Lyons v. Southeastern Greyhound Lines, 282 Ky. 106, 137 S.W.2d 1107 (1940).

¹³ Thomas Jefferson Fire Ins. Co. v. Barker, 251 S.W.2d 862, 863 (Ky. 1952).

¹⁴ Kentucky Transp. Corp. v. Spurlock, 354 S.W.2d 509, 512 (Ky. 1961).

¹⁵ Current v. Columbia Gas, 383 S.W.2d 139, 142 (Ky. 1964).

¹⁶ Life & Casualty Ins. Co. v. Knight, 279 S.W.2d 10 (Ky. 1955); Accord, e.g., Kentucky Power Co. v. Dillon, 345 S.W.2d 486 (Ky. 1961); Taul v. Commonwealth, 249 S.W.2d 45 (Ky. 1952); Slusher v. Blanton, 296 Ky. 422, 177 S.W.2d 378 (1944); Louisville Ry. v. Prather, 290 Ky. 791, 162 S.W.2d 780 (1942).

¹⁷ Cloversplint Coal Co. v. Blair, 287 Ky. 158, 159, 151 S.W.2d 1052, 1053 (1941).

trial judge must gauge that proof in terms of the extent to which it *convinces* him of the existence or nonexistence of the disputed proposition. And, since he does this only with a view toward keeping the jury within the "bounds of reasonable action,"¹⁸ his mental response in each instance should be one of these three: (1) That no reasonable juror could find the existence of the fact in issue; (2) that reasonable jurors could differ as to the existence or nonexistence of the fact in issue; or, (3) that no reasonable juror could find the nonexistence of the fact in issue. By structuring the burden of going forward in terms of these responses, the burden of proof concept could be applied with much less difficulty and confusion than presently exists. To demonstrate this, and to provide a framework within which to discuss presumptions, the following diagram may be utilized:¹⁹

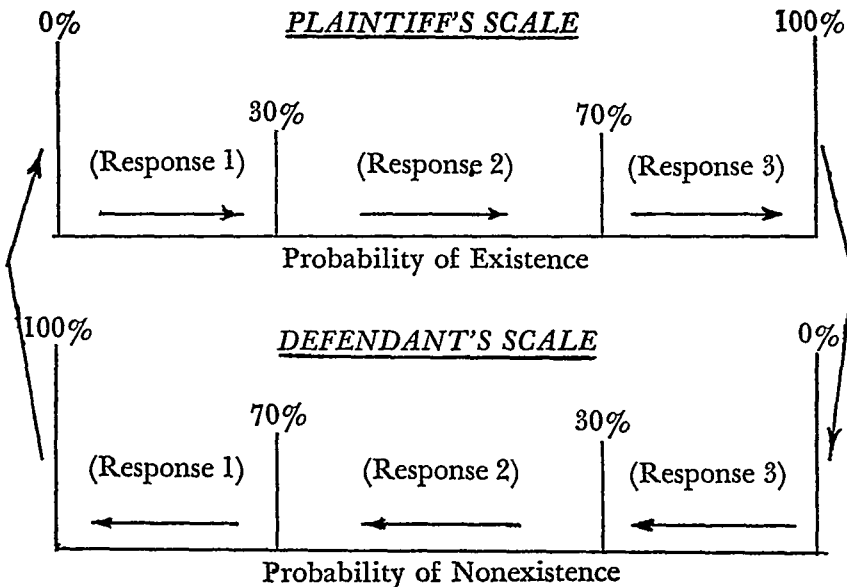


Figure I: Diagram Depicting Burden of Proof in Civil Litigation.

¹⁸ 9 WIGMORE § 2487.

¹⁹ A diagram similar to this was used first by Wigmore to describe the burden of proof concept. *Id.* His diagram, however, was not constructed to provide an answer to the difficult question concerning the sufficiency of proof essential to acquire or avoid a directed verdict. Another attempt to diagram "burden of proof" was made by Professor McNaughton. McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 HARV. L. REV. 1382 (1955). His diagrams were not simple enough to make possible elimination of the almost insuperable confusion that has developed in connection with the burden of proof idea. The diagram used in this article is designed to provide the needs unsatisfied by the previous ones.

Each response listed above is represented on this diagram as a "range of probability values falling between two points."²⁰ The first is represented on the Plaintiff's Scale as 0 to 30 percent range of probability and on the Defendant's Scale as 70 to 100 percent range of probability; the second is represented on both scales as 30 to 70 percent range of probability; and, the third is represented as 70 to 100 percent range on the Plaintiff's Scale and 0 to 30 percent range on the Defendant's Scale. Representing the responses as probability ranges conforms to the notion that the function of a trial judge is not to decide whether the disputed fact exists, but only whether the proof can form a *reasonable basis* for a jury decision, should the jury be permitted to decide. Placing each response on both scales of the diagram represents the idea that a judge's "determination of the degree of *probability of the existence of a fact* necessarily implies a simultaneous determination of the complementary degree of *probability of non-existence of the fact*."²¹ (Emphasis added). (For example, if the judge should determine that the existence of the fact in issue is 30 percent probable, his determination would necessarily imply that the non-existence of the fact is 70 percent probable). By treating the probability ranges of Figure 1 as *hypothetical representations* of the quantity of proof which will serve to elicit from the trial judge one of the foregoing responses, the burden of proof concept can be more easily understood.

B. Burden of Going Forward With Evidence

At the outset of a trial, one of the parties (assumed in Figure 1 to be the Plaintiff) must bear the responsibility of initially presenting proof on the proposition in issue. This responsibility is described above as the duty of going forward with evidence. Until it is satisfied, the party who must bear it is subject to a response from the judge that no reasonable juror could find the existence of the proposition asserted to exist (Response 1, Figure 1). The consequence of such a response, as indicated before, is a directed verdict for the other party (assumed in Figure 1 to be the Defendant). To avoid this consequence, the Plaintiff must produce sufficient evidence to convince the judge that reasonable

²⁰ McNaughton, *supra* note 19, at 1386.

²¹ *Id.* at 1383.

jurors could differ as to the existence or nonexistence of the proposition in issue (Response 2, Figure 1). The minimum amount of evidence necessary to achieve this degree of conviction is hypothetically represented on the Plaintiff's Scale of Figure 1 as 30 percent probability of existence.²²

In the process of satisfying this initial responsibility, the Plaintiff may do more than merely convince the judge that reasonable jurors could differ in their determination of the issue. He may be able to introduce enough proof to persuade the judge that no reasonable juror could find the nonexistence of the proposition in dispute (Response 3, Figure 1). The minimum amount of evidence necessary to warrant this response is hypothetically represented on the Plaintiff's Scale as 70 percent probability of existence. If this degree of probability is established (or stated more correctly, if Response 3 is elicited), the trial judge is obligated to place the Plaintiff "in the same position that was occupied by the [Defendant] at the opening of the trial."²³ The burden of going forward with the evidence is shifted to the Defendant, and, under threat of an adverse ruling, he must introduce enough evidence to once more convince the judge that reasonable jurors could differ as to the existence or nonexistence of the fact in dispute. The point at which this degree of conviction is achieved is represented on the Defendant's Scale as 30 percent probability of nonexistence. This degree of probability once again takes the issue away from the judge and places it into the hands of the jury. It remains in the jury's hands until the defendant introduces enough evidence to achieve the 70 percent probability of nonexistence level, which serves to again elicit from the judge a response that no reasonable juror could find the existence of the proposition in issue (Response 1, Figure 1). If the defendant achieves this degree of conviction with his proof, the burden of going forward with the evidence is shifted back to the plaintiff and the above-described process starts again.²⁴

²² As the diagram of Figure 1 is designed, the 30 percent probability level could be more accurately described as 30 percent plus an infinitesimal amount of additional probability. The same is true of the 70 percent probability-of-existence level and the 30 and 70 percent probability-of-nonexistence levels. The additional probability avoids the problem of having the diagram depict two separate responses from the judge on the basis of the probability at the 30 and 70 percent levels.

²³ 9 WIGMORE § 2487.

²⁴ *Id.*

This process by which the burden of going forward is shifted back and forth between the parties naturally ceases after both have produced all their evidence. The judge must then make his final assessment of the proof. If, in making that assessment, he becomes convinced that reasonable jurors could differ as to where the balance of probability lies, then the case must be submitted to the jury for decision. At this point in the proceedings, the burden of going forward loses its significance and disappears from consideration. The other responsibility of the burden of proof concept then comes into operation.

C. Risk of Non-Persuasion

This responsibility serves to impose upon one of the litigants the burden of persuading the jury that the proposition asserted possesses the required degree of probability, which is usually described as "a preponderance of evidence." Most often, it is imposed upon the party first having the burden of going forward with evidence on the proposition in issue. And, unlike the burden of going forward, this responsibility is said to never shift.²⁵

As construed by the Kentucky Court of Appeals, this aspect of the burden of proof concept has a very limited role in the judgment process of civil cases. Its greatest limitation has been imposed by cases which provide that jury instructions should not contain the expression "preponderance of evidence"²⁶ and should not state which party has the burden of persuasion.²⁷ Instead, the trial court is expected to so "frame the instructions as to indicate on whom the burden of proof lies."²⁸ The manner in which this is achieved is the factor which limits the significance of the risk of non-persuasion. Consider for example a case in which the existence or non-existence of Fact A and Fact B is the disputed issue. If the risk of non-persuasion is to be imposed upon the plaintiff, the instruction would be framed as follows: "If you believe from the evidence that Fact A and Fact B exist, the law is for the plaintiff and you must decide in his favor." On the same issue, if the risk of non-

²⁵ See 9 WIGMORE § 2489; Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195 (1953).

²⁶ E.g., *Swopshire v. Commonwealth*, 246 Ky. 593, 55 S.W.2d 356 (1932); *Louisville & N.R.R. v. Allen's Adm'r*, 174 Ky. 736, 192 S.W. 863 (1917).

²⁷ E.g., *Cincinnati, N.O.&T.P. Ry. v. Halcomb*, 32 Ky. L. Rptr. 381, 105 S.W. 986 (1907).

²⁸ *Mills v. Louisville & N.R.R.*, 116 Ky. 309, 316, 76 S.W. 29, 31 (1903).

persuasion is to be imposed upon the defendant, the instruction would be in these words: "Unless you believe from the evidence that Fact A and Fact B exist, the law is for the plaintiff and you must decide in his favor." Perhaps an ordinary juror, being untrained in the law, could appreciate the distinction between these two instructions. Perhaps he could not. In either event, the underlying purpose of the risk of non-persuasion in civil cases should be satisfied. Each of these instructions provides the jurors with a rule of law which decides the issue for them in those rare instances when their mental convictions are in balance, *i.e.*, the existence of the disputed fact is believed to be as probable as its nonexistence. In civil litigation, the risk of non-persuasion merits no greater significance.²⁹

III. BURDEN OF PROOF—CRIMINAL LITIGATION

A. Introduction

Judicial trials are designed to reconstruct a specific factual incident or situation. But no matter how regulated or disciplined this reconstruction process becomes, it must operate without the benefit of a scientific yardstick for searching out the truth. Consequently, in a criminal case, if the issue of guilt or innocence is seriously contested, some degree of doubt as to the truth of the charges must inevitably remain after the reconstruction process has been completed. This imperfection in the process has created two conflicting needs. The first is the need for society to impose its sanctions upon an accused without resorting to absolute or mathematical certainty of guilt. The second is a need for a means of protection against the intolerable injustice of convicting the innocent. Efforts to reconcile these needs have culminated in the requirement that no man can be convicted of criminal conduct in the absence of proof which convinces the decision-makers of his guilt "beyond a reasonable doubt." This requirement has a substantial influence upon both responsibilities of the burden of proof concept in criminal litigation. Its influence upon the most significant of the two, the risk of non-persuasion, is discussed first.

²⁹ See James, *Burdens of Proof*, 47 VA. L. REV. 51 (1961).

B. Risk of Non-Persuasion

In its broadest application, the "reasonable doubt" concept serves to impose upon the prosecution the burden of persuading the jury of the defendant's guilt. In doing this, it performs a more important function of particularizing the categories in which the jury's response to the evidence must be made. Although these categories may be rather complex in some cases, the manner in which they are affected by the requirement that guilt be established beyond a reasonable doubt may be demonstrated by this simple diagram:



Figure 2. Diagram Showing Response Categories In Criminal Trial.

This two-category scale with open ends is used to represent the idea that the extremes of judgment are unlimited,³⁰ and that the jury has no responsibility to determine degrees of "guilt" or "innocence". The only point of significance on the scale is the boundary between the two categories. It is significant only because it can be shifted to the right by defining guilt in such a way as to require a high degree of probability for conviction. Such a shift serves to increase the size of the innocence category and correspondingly decrease the size of the guilt category. For example, if the jury should be instructed that guilt can be established only by proof to an absolute certainty, and if an assumption is made that absolute certainty is attainable by human judgment, the response categories, with a probability scale added, could be depicted as follows:

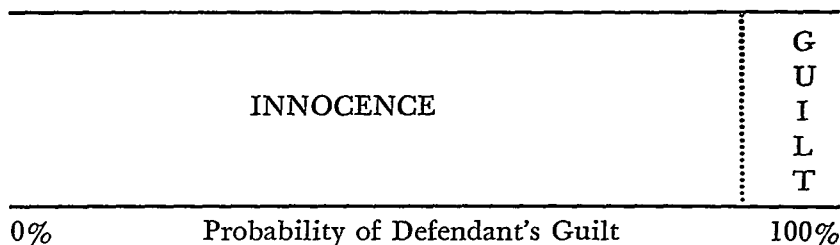


Figure 3. Response Scale Requiring Absolute Certainty of Judgment.

³⁰ See JOHNSON, *THE PSYCHOLOGY OF THOUGHT AND JUDGMENT* 326 (1955).

As demonstrated by this diagram, the influence of this instruction upon the response scale would be such that almost no guilt responses could be expected.

In instructing jurors that guilt must be established "beyond a reasonable doubt," courts have attempted to shift the boundary between the response categories of Figure 2 to the right so as to give the accused some advantage over the prosecution. To achieve this objective, some have assumed that the phrase, "beyond a reasonable doubt," can be rendered more intelligible by definition, and have ruled that an accused is entitled to have its proper meaning and application delineated.³¹ In performing this task, some judges have defined the concept affirmatively, using such tenuous phrases as "a substantial doubt,"³² "a doubt based upon reason,"³³ or "a doubt which would cause an ordinary and prudent person to hesitate and pause."³⁴ Others have defined it negatively: "reasonable doubt is not a vague, speculative, imaginary doubt";³⁵ "proof beyond a reasonable doubt does not mean proof to an absolute or mathematical certainty";³⁶ or, "it is not a captious or possible doubt."³⁷ Still others have reverted to language discarded long ago by the Supreme Court, stating that "beyond a reasonable doubt means to a reasonable or moral certainty."³⁸ The net result of all efforts to make the concept more transparent to jurors has been an endless quibbling in the appellate courts over the effect of obscure and meaningless words.

Because of this, other courts, including the Kentucky Court of Appeals, have taken a different approach, one that imagines the existence of such a connection between the "reasonable doubt" phrase and the signification attributed to it that no juror can help

³¹ *E.g.*, *Williams v. United States*, 271 F.2d 703 (4th Cir. 1959); *Mundy v. United States*, 176 F.2d 32 (D.C. Cir. 1949).

³² *E.g.*, *United States v. Heap*, 345 F.2d 170 (3d Cir. 1965); *Hopper v. United States*, 216 F.2d 684 (10th Cir. 1954).

³³ *E.g.*, *United States v. Davis*, 323 F.2d 864 (2d Cir. 1964); *Holland v. United States*, 209 F.2d 516 (10th Cir. 1954).

³⁴ *E.g.*, *Scurry v. United States*, 347 F.2d 468 (D.C. Cir. 1965); *United States v. Harris*, 346 F.2d 182 (4th Cir. 1965); *Jones v. United States*, 338 F.2d 553 (D.C. Cir. 1964).

³⁵ *E.g.*, *United States v. Johnson*, 343 F.2d (2d Cir. 1965); *Bishop v. United States*, 107 F.2d 297 (D.C. Cir. 1939).

³⁶ *E.g.*, *McGill v. United States*, 348 F.2d 791 (D.C. Cir. 1965); *Scurry v. United States*, 347 F.2d 468 (D.C. Cir. 1965).

³⁷ *E.g.*, *Hooper v. United States*, 216 F.2d 684 (10th Cir. 1954).

³⁸ *E.g.*, *United States v. Molin*, 244 F. Supp. 1015 (D. Mass 1965); *Holland v. United States*, 209 F.2d 516 (10th Cir. 1954).

but understand its meaning.³⁹ The fault with this approach, if any, is that even in the minds of the communicators the phrase does not represent a precise idea. No one could reasonably profess to know the extent to which the innocence category is enlarged by the reasonable doubt instruction. Probably, it is dependent partly upon the gravity of the offense being tried. In a murder case the boundary between the response categories could be expected to be more to the right of center than in an assault case. Thus, a greater degree of probability would be required for a conviction of murder.⁴⁰

Other than this, little can be said about the influence of the reasonable doubt instruction on the response categories. It is quite possible that the Court of Appeals is correct in its assertion that jurors generally understand what is meant by "reasonable doubt."⁴¹ Without additional explanation, the phrase may serve to caution the jury that an accused is not to be convicted on the basis of a mere balance of probability but only on a showing of very high probability. At the same time it should imply that absolute certainty in human judgment is beyond expectation. As indicated earlier, these are the functions which it is expected to perform.

C. Burden of Going Forward With Evidence

The notion that underlies the operation of the burden of going forward with evidence in civil litigation is equally applicable to criminal trials.⁴² Before a jury may pass upon the evidence that has been presented, the prosecution must introduce sufficient proof to persuade the judge that a verdict by that jury would have a "reasonable" basis. In describing the quantity of proof necessary to satisfy this responsibility, the Court of Appeals has used virtually the same standards which have been employed in civil cases. In the early cases, the standard was stated as follows: "[I]f there is *any evidence*, however slight or circumstantial, which

³⁹ See, e.g., *People v. Van Dyke*, 414 Ill. 251, 113 N.E.2d 165 (1953); *Brooks v. State*, 52 So. 2d 616 (Miss. 1951); *Simms v. State*, 203 Ga. 668, 47 S.E.2d 862 (1948); *State v. Cavener*, 356 Mo. 602, 202 S.W.2d 869 (1947).

⁴⁰ It may be that this feature of the jury system is not dependent at all upon the reasonable doubt concept. The mental attitude of jurors may be such that the graver the consequences of their decision, the more caution they can be expected to exercise in making that decision. A reminder to do so may be unnecessary, an instruction to do otherwise ineffective.

⁴¹ See *Frierson v. Commonwealth*, 175 Ky. 684, 194 S.W. 914 (1917).

⁴² See *Noah v. Commonwealth*, 273 Ky. 272, 116 S.W.2d 315 (1938).

tends to show guilt of the crime charged . . . , it is the trial court's duty to submit the case to the jury."⁴³ On other occasions, the Court has stated that evidence is sufficient to satisfy the prosecution's burden of going forward only if it is "so unequivocal and incriminating as to exclude every reasonable hypothesis of innocence."⁴⁴ And, finally, the Court has ruled that a criminal case should not be submitted to the jury if a verdict of guilty would be "so flagrantly against the evidence as to shock the conscience or lead to a belief that the verdict was the result of prejudice on the part of the jury."⁴⁵

Despite the similarity of standards, the burden of going forward does not operate in a criminal case as it does in a civil case. Its principal differences may be shown by the use of a diagram patterned after that of Figure 1:

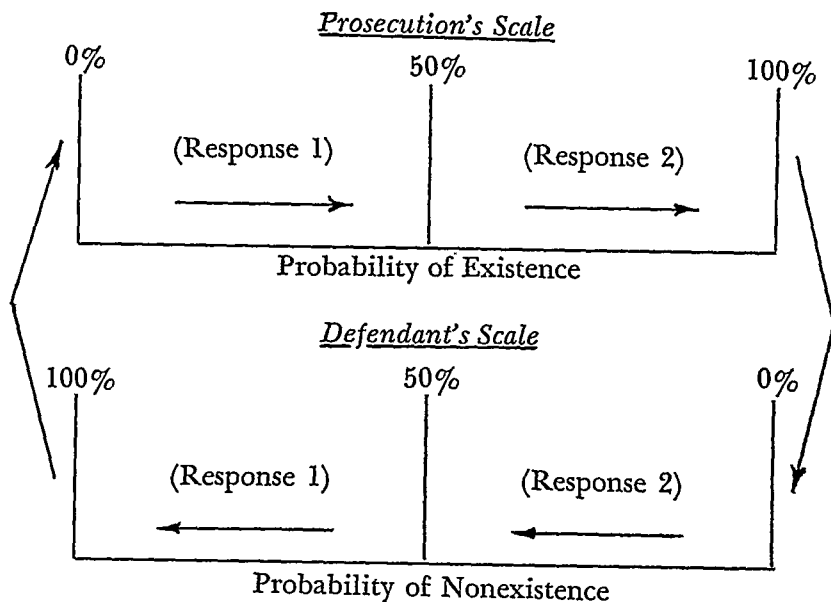


Figure 4: Burden of Going Forward With Evidence—Criminal Litigation.

⁴³ *Harlan v. Commonwealth*, 253 Ky. 1, 10, 68 S.W.2d 443, 447 (1934). *Accord*, *Mason v. Commonwealth*, 357 S.W.2d 667 (Ky. 1962); *Collins v. Commonwealth*, 243 Ky. 438, 48 S.W.2d 1053 (1932).

⁴⁴ *Turner v. Commonwealth*, 328 S.W.2d 536, 538 (Ky. 1959); *Accord*, *Birdsong v. Commonwealth*, 289 Ky. 521, 159 S.W.2d 41 (1942).

⁴⁵ *Carr v. Commonwealth*, 307 Ky. 207, 210, 210 S.W.2d 778, 780 (1948). *Accord*, *Birdsong v. Commonwealth*, 289 Ky. 521, 159 S.W.2d 41 (1942); *Noah v. Commonwealth*, 273 Ky. 272, 116 S.W.2d 315 (1938).

Because of the reasonable doubt principle, it is not enough in a criminal case that the jury find the existence of a proposition to be more probable than its nonexistence. Consequently, in passing upon the sufficiency of the evidence, the trial judge knows that jurors, if the case is submitted to them, may be compelled "to find that a fact does not exist even though persuaded by normal standards that the fact does exist."⁴⁶ This difference in the degree of jury persuasion influences the burden of going forward in criminal cases by requiring a greater quantity of evidence to satisfy the prosecution's initial responsibility. The minimum amount sufficient to satisfy this responsibility is hypothetically represented on the Prosecution's Scale of Figure 4 as 50 percent probability of existence. Until this quantity of proof is produced, the prosecution is subject to a response from the judge *that no reasonable juror could find the existence of the proposition in issue to the exclusion of a reasonable doubt*. (This response is hypothetically represented on Figure 4 as the ranges of probability values falling between 0 and 50 percent on the Prosecution's Scale and 50 and 100 percent on the Defendant's Scale and is designated as Response 1.) The consequence of such a response is a directed verdict of acquittal. Satisfaction of this responsibility by the prosecution serves to elicit from the judge a response *that reasonable jurors could find the existence of the proposition in issue to the exclusion of a reasonable doubt*. (This response is hypothetically represented on Figure 4 as the ranges of probability values falling between 50 to 100 percent on the Prosecution's Scale and 0 and 50 percent on the Defendant's Scale, and is designated as Response 2.) To understand presumptions in criminal litigation, it is important to realize that the prosecution, in satisfying this responsibility, can never introduce enough proof to shift to the accused the burden of going forward. Even though the evidence is so convincing that the trial judge believes the existence of guilt to be 100 percent probable, a verdict cannot be directed against the defendant.⁴⁷ A plea of not guilty serves to create for the accused a jury issue upon every fact essential to his conviction.⁴⁸

⁴⁶ McNaughton, *supra* note 19, at 1389.

⁴⁷ See, e.g., *Mills v. Commonwealth*, 195 Ky. 813, 243 S.W. 1022 (1922); *Wells v. Commonwealth*, 195 Ky. 754, 243 S.W. 1032 (1922); *Bardin v. Commonwealth*, 195 Ky. 652, 231 S.W. 208 (1921).

⁴⁸ *Commonwealth v. Gentry*, 261 Ky. 564, 88 S.W.2d 273 (1935); *Ball v. Commonwealth*, 81 Ky. 662 (1884).

Once the prosecution has satisfied its initial responsibility of producing enough evidence to elicit Response 2, the defendant may undertake to introduce proof of the nonexistence of the facts essential to conviction. In doing so, he may be able to offer sufficient proof to again persuade the judge that no reasonable juror could find the existence of these facts to the exclusion of a reasonable doubt. The point at which this degree of mental "convincement" is achieved is represented on the Defendant's Scale of Figure 4 as 50 percent probability of nonexistence. Its achievement serves to reimpose upon the prosecution the burden of going forward with proof, which, if unsatisfied, will again entitle the accused to a directed verdict. If, after all the proof by both sides has been introduced, the judge believes that a reasonable jury *could* find the existence of the facts in issue proved "beyond a reasonable doubt," a jury issue has been created and the burden of going forward has served its purpose.

IV. PRESUMPTIONS

A. General Presumption Doctrine in Kentucky

One of the principal causes for the confusion which exists in the Kentucky law of presumptions has been the failure of the Court of Appeals to define "presumptions" as rules of law and, on that basis, to distinguish them from "inferences." Only on rare occasions has the Court even hinted at the existence of such a distinction:

Presumptive evidence is sometimes mistakenly confused with circumstantial evidence but strict accuracy distinguishes it therefrom. Presumptive evidence is the proof of one fact, which, when shown, has a legitimate tendency to lead the mind to the conclusion that another fact to be proven is in existence. *It may be the result of an arbitrary rule or legislative enactment. . . .* Circumstantial evidence is the proof of facts which have a *legitimate tendency from the laws of nature, the usual connection of things, and ordinary transactions of business, etc.*, to show the reasonable mind that the disputed fact was or was not in existence.⁴⁹ (Emphasis added).

⁴⁹ *Stark's Adm'x v. Herndon's Adm'r*, 292 Ky. 469, 472, 166 S.W.2d 828, 830 (1942).

With somewhat more precision and clarity, this distinction has been expressed as follows:

If a court determines that B is a rational inference from A, then the trier of fact is free to draw that inference as a matter of general lay reasoning and persuasion without the aid of any special procedural rules pertaining to litigation. Since there are such special rules, since the word 'presumption' is often used to refer to them, and since 'inference' is the word generally used to refer to the process of drawing conclusions of fact on the basis of general lay reasoning and experience, it serves clarity and avoids confusion to observe this distinction between the two words.⁵⁰

With this distinction in mind, a presumption should be defined as a "rule of law which creates an artificial probative relation or recognizes a naturally existing probative relation between two specific facts, one of which is proved [hereinafter called basic fact] and the other unproved [hereinafter called presumed fact],"⁵¹ and which attributes to that relationship a particular procedural significance.⁵² The relationship of the proved to the unproved can be described best by stating this well-known presumption: If a person can be shown to have left his usual place of residence and to have been absent without explanation for seven years (basic facts), he is presumed to be deceased (presumed fact). The procedural significance of the relationship is more difficult to describe.

Referring to the diagram of Figure 1, once the basic facts have been established, a presumption should always serve to achieve for the party in whose favor it operates a response from the judge that no reasonable juror could find the nonexistence of the presumed fact (achievement of 70 percent probability, Plaintiff's Scale,

⁵⁰ James, *supra* note 29, at 64.

⁵¹ Geraldson, *Effect of Presumptions*, 26 MARQ. L. REV. 115, 116 (1942). *Accord*, 9 WIGMORE § 2491; Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906 (1931); Stumbo, *Presumptions—A View at Chaos*, 3 WASHBURN L.J. 182 (1964).

⁵² This definition, and the discussion which follows, does not include those rules of law known as "conclusive presumptions." It is conceded by all that such rules play no part in a discussion of the law of presumptions. As stated by Wigmore: "Whenever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing any evidence that the second fact does not exist, the rule is really providing that where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case; and to provide this is to make a rule of substantive law, and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence." 9 WIGMORE § 2492.

Figure 1).⁵³ Given this significance, the presumption does two things for its proponent. It satisfies his initial burden of going forward with evidence, and at the same time shifts that burden over to the opponent of the presumption.⁵⁴ Unless these two consequences follow proof of the basic facts, as stated by Wigmore, "there is no propriety in applying the term 'presumption' to such facts, however great their probative significance."⁵⁵ Except in those instances where the Court of Appeals has failed to distinguish presumptions and inferences, Kentucky cases have accorded presumptions these two procedural consequences.

The difficulty in applying a presumption arises after it has been accorded the above consequences and its opponent has introduced sufficient evidence to elicit from the judge a response that reasonable jurors could differ as to the existence or nonexistence of the presumed fact (achievement of 30 percent probability, Defendant's scale, Figure 1). Of course, such evidence serves to satisfy the responsibility which was shifted to the opponent by the presumption. And, as stated before, with this response (designated on Figure 1 as Response 2), the burden of going forward with evidence vanishes and the risk of non-persuasion comes into focus. Also coming into focus are questions related to the continuing effect of the presumption: Being a rule of law, does it simply disappear into the "sun-shine of actual facts,"⁵⁶ or does it have an effect upon the placement of the risk of non-persuasion? Does it serve to impose upon the party against whom it operates the burden of establishing to the satisfaction of the jury the nonexistence of the presumed fact? To what extent, if any, will the jurors be permitted to use the presumption in making their decision, and how are they to be instructed as to its appropriate use? All of these questions are vital to a proper application of presumptions. Yet, efforts to

⁵³ The discussion in this section, as well as those which follow, assumes that the basic facts of the presumptions under consideration are not contested. This assumption is made to avoid discussion of matters which have been adequately discussed in many of the articles cited in this writing. It is necessary, however, to emphasize that an opponent of a presumption has two distinct avenues of attack against the operation of that presumption. He may contest the existence of the basic facts or he may concede their existence and contest the existence of the presumed fact. It is the latter situation which has created the difficult problems.

⁵⁴ See 9 WIGMORE § 249; Morgan, *supra* note 51; Surbin, *Presumptions and Their Treatment Under the Law of Ohio*, 26 OHIO ST. L.J. 175 (1965).

⁵⁵ WIGMORE § 2491.

⁵⁶ Mockowik v. Kansas City, St. J. & C.B.R.R., 196 Mo. 550, 571, 94 S.W. 256, 262 (1906).

answer them have been virtually chaotic, with little uniformity among or within jurisdictions.

The simplest and most widely accepted answers have been provided by Professors Thayer⁵⁷ and Wigmore.⁵⁸ Under the approach developed by these two scholars, once the opponent of a presumption introduces enough proof to convince the trial judge that a reasonable juror could find that the presumed fact does not exist (Response 2, Figure 1), "the presumption disappears as a rule of law, and the case is [left] in the jury's hands free from any rule."⁵⁹ The risk of non-persuasion is unaffected by the operation of the presumption and no mention of the relationship between the basic facts and the presumed fact is made to the jury. Two reasons are presented in support of this view. One, previously mentioned, is that the risk of non-persuasion is fixed at the beginning of a trial and can never shift from its original allocation. The other is a belief, originating with Thayer and Wigmore, that all presumptions "[are] based, in policy, upon the probative strength, as a matter of reasoning and inference, of the [basic] facts,"⁶⁰ and that these basic facts should never be endowed with any artificial, judicially-imposed probative force. To permit a presumption to affect persuasion of the jury in any manner is thought to endow it with such force.

This approach has been questioned on two grounds. The first concerns its thesis that the risk of non-persuasion, once allocated, can never shift:

Surely there is no inherent reason why the original allocation should not be reconsidered when the case finally goes to the jury, on all the factors which are seen to be relevant at *that* time. Moreover . . . there is no need to make any allocation of the persuasion burden at the beginning of the trial or at any other time unless and until the production burden on every dispositive issue is out of the case and the issues are submitted to the jury, so that all talk of shifting the persuasion is beside the point. And surely the considerations relevant at the time of final submission should determine how the persuasion burden is to be placed, and not those which appeared

⁵⁷ P. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 313-52 (1898).

⁵⁸ See 9 WIGMORE §§ 2490-93.

⁵⁹ *Id.* at § 2491.

⁶⁰ *Id.*

to be relevant at an earlier time if they are different.⁶¹ (Emphasis added).

The second concerns the Thayer-Wigmore belief that all presumptions owe their existence solely to a rational probative connection between the basic facts and the presumed fact. The chief opponent of this belief was Professor Morgan who asserted that all presumptions cannot be made to accommodate the same procedural function because their creation and existence are justified by different reasons.⁶² For example, some presumptions, such as the one which presumes death after an unexplained absence of seven years, have no reason for their existence other than "a purely procedural convenience" to enable courts to resolve disputes which would otherwise be insoluble.⁶³ Others, such as the presumption that a letter properly addressed and mailed is received in due course by the addressee, owe their existence to the probative strength of the basic facts. A presumption of either of these types, according to Morgan, satisfies its purpose simply by shifting the burden of going forward with evidence to the party against whom it operates.⁶⁴ If and when this shifted burden is discharged the presumption disappears from the case, just as under the Thayer-Wigmore approach. Other presumptions, however, have a more substantial reason for their existence and merit a more substantial procedural function. Illustrative of such presumptions is the one which presumes that if commercial goods have been transported by several carriers and delivered to the addressee in a damaged condition, the carrier last having possession caused the damage. This presumption has its origin "in considerations of the comparative convenience with which the parties can produce evidence of the fact in issue."⁶⁵ And since one of the principal factors used to allocate the risk of non-persuasion is the relative access of the parties to knowledge about the disputed fact, to accord this presumption no more effect than to shift the burden of going forward with evidence is to ignore in great part the reason

⁶¹ James, *supra* note 29, at 62-63.

⁶² See Morgan, *supra* note 51; Morgan, *Further Observations on Presumptions*, 16 S. CAL. L. REV. 245 (1943); Morgan, *How to Approach Burden of Proof and Presumptions*, 25 ROCKY MT. L. REV. 34 (1952); Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59 (1933).

⁶³ See Morgan, *supra* note 51.

⁶⁴ *Id.*

⁶⁵ *Id.* at 926.

for its existence. Thus, Morgan asserted that presumptions of this kind, in addition to shifting the burden of going forward, should compel the opponent to persuade the jury of the nonexistence of the presumed fact, *i.e.*, bear the risk of non-persuasion.

The effect given a presumption in Kentucky, after evidence to rebut it has been introduced, is not without considerable uncertainty. The Court of Appeals appears, although not expressly, to have adopted the reasoning of Thayer and Wigmore, that presumptions are based in policy solely upon the natural probative strength of their basic facts. As stated in the case of *Lee v. Tucker*,⁶⁶ if evidence is to be "accorded the dignity of a presumption it should not be because a wooden rule puts it in that category, but only because it is that persuasive."⁶⁷ The Court also purports to agree with the view of these two scholars concerning allocation of the risk of non-persuasion:

As to the shifting of the burden of proof, the first burden mentioned above, the risk of non-persuasion never shifts. The burden of proof is on the party who would be defeated if no evidence were offered on either side and is fixed at the beginning of the trial by the nature of the allegations of the pleadings, and does not change during the course of the trial. . . . The second kind of burden, however, the duty of going forward with evidence, does have this characteristic of shifting.⁶⁸

With this reason for the existence of presumptions and this construction of the burden of proof concept, the Kentucky Court has always asserted that a presumption can serve only to shift to its opponent the burden of going forward with evidence.⁶⁹ When this burden is satisfied, "the presumption disappears, and the issues must be decided on the evidence."⁷⁰ Stated more succinctly, a presumption "one moment stands with sufficient force to determine an issue, but at the next, by reason of the slightest re-

⁶⁶ 365 S.W.2d 849 (Ky. 1963).

⁶⁷ *Id.* at 851.

⁶⁸ *Galloway Motor Co. v. Huffman's Adm'r*, 281 Ky. 841, 851, 137 S.W.2d 379, 384 (1940). *Accord*, *Moss v. Mittel*, 253 Ky. 504, 69 S.W.2d 1046 (1934).

⁶⁹ *See, e.g.*, *Houser v. Coursey*, 310 Ky. 625, 221 S.W.2d 432 (1949); *Cincinnati, N.O. & T.P.Ry. v. Nelson*, 299 Ky. 19, 184 S.W.2d 108 (1944); *Dunning v. Kentucky Util. Co.*, 270 Ky. 44, 109 S.W.2d 6 (1937); *see also*, *Hall v. E. I. Dupont De Nemours & Co.*, 142 F. Supp. 737 (E.D. Ky. 1956).

⁷⁰ *Carroll v. Carroll*, 251 S.W.2d 989, 991 (Ky. 1952). *Accord*, *Dudley's Adm'r v. Fidelity & Deposit Co.*, 240 S.W.2d 76 (Ky. 1951); *Poindexter's Adm'r v. Alexander*, 277 Ky. 147, 125 S.W.2d 981 (1939).

butting evidence, topples utterly out of consideration for the trier of facts."⁷¹

Despite frequent and unequivocal assertions such as these, on several occasions the Kentucky Court has attributed to presumptions a more significant procedural consequence. An example is the case of *Utilities Appliance Co. v. Toon's Adm'r*.⁷² In this case, the plaintiff's intestate, while crossing a street, had been killed by a vehicle driven by the defendant's employee. The death occurred in a residential area, and proof that the defendant's vehicle was traveling in excess of twenty miles per hour at the time of the accident was presented. To establish negligence, the plaintiff relied upon a statute which created a presumption of unreasonable and improper driving upon proof of a rate of speed in a residential district of more than twenty miles per hour. This presumption was accorded its usual functions. It satisfied the plaintiff's initial responsibility of going forward with evidence on the negligence issue, and then shifted that responsibility to the defendant. By introducing proof that, in spite of the excessive speed, his vehicle was operated reasonably and properly under the circumstances, the defendant satisfied his burden. Under the Thayer-Wigmore view, at this point in the proceedings the purpose of the presumption should have been spent, and the issue of negligence submitted to the jury without mentioning the presumption and with the risk of non-persuasion allocated to the plaintiff. This was not the procedural consequence ordered by the Court of Appeals. After stating that this presumption served to shift the burden of proof, the Court clearly indicated that it intended by this the risk of non-persuasion, for it ordered that the following instruction be given on retrial:

If you believe from the evidence that the defendant's vehicle was traveling in excess of twenty miles per hour at the time of the accident, you must find for the plaintiff, unless you further believe that the speed of the vehicle, although in excess of twenty miles per hour, was not unreasonable or improper under the circumstances.⁷³

As indicated earlier, an instruction such as this serves under Ken-

⁷¹ *Prudential Ins. Co. of America v. Tuggle's Adm'r*, 254 Ky. 814, 819, 72 S.W.2d 440, 443 (1934).

⁷² 241 Ky. 823, 45 S.W.2d 478 (1932).

⁷³ 241 Ky. at 824, 45 S.W.2d at 479.

tucky law to impose upon the defendant the risk of non-persuasion as to the presumed fact.

The *Toon's* case is not the only case in which the Court of Appeals has used a presumption to shift the risk of non-persuasion. In the case of *Schechter v. Hann*⁷⁴ such treatment was accorded the doctrine of *res ipsa loquitur*. Involved in *Schechter* was an injury which the plaintiff had received when struck by the defendant's car. To establish negligence, the plaintiff proved facts necessary to invoke the doctrine of *res ipsa loquitur*.⁷⁵ Defendant countered with proof that a spring on his vehicle broke and caused him to lose control of the vehicle without negligence on his part. In reference to the procedural function of *res ipsa loquitur*, the Court of Appeals said that "a presumption of negligence arises and the burden of proof is on the defendant to rebut the presumption."⁷⁶ This time the Court in two ways indicated that burden of proof, as used in its statement, was meant to include not only the burden of going forward but also the risk of non-persuasion. First the Court approved an instruction submitting the negligence issue to the jury in these words:

You will find for the plaintiff, unless you believe from the evidence that the spring on the defendant's car broke and caused him to lose control of his car.⁷⁷

Secondly the Court stated:

Unless he, [the defendant], was able to establish to the jury's satisfaction that there was such an intervening agency [breaking of the spring], the presumption of negligence remained and controlled.⁷⁸ (Emphasis added).

In spite of cases such as *Toon's* and *Schechter*, the Court of Appeals continues to assert that the risk of non-persuasion can never shift.

Before undertaking a discussion of the treatment accorded the more important particular presumptions under Kentucky law, the problem of instructing jurors as to the existence of presumptions should be mentioned. On this point the Thayer-Wigmore

⁷⁴ 305 Ky. 794, 205 S.W.2d 690 (1947).

⁷⁵ As subsequent discussion will reveal, Kentucky, with great difficulty and confusion, has attempted to treat this doctrine as a presumption.

⁷⁶ 305 Ky. at 797, 205 S.W.2d at 692.

⁷⁷ *Id.*

⁷⁸ *Id.* at 798, 205 S.W.2d at 693.

view and the Morgan view are in agreement that jurors are not generally capable of accurately and intelligently applying presumptions.⁷⁹ Thus, under neither of these views are presumptions submitted to jurors for consideration in the decision-making process. If the presumption is one which merely shifts the burden of going forward with evidence, satisfaction of that burden serves to dissolve the presumption. If it is of such a nature that, under the Morgan view, it functions to transfer the risk of non-persuasion, then the jurors are instructed in such a way that the burden of persuading them as to the nonexistence of the presumed fact is on the party against whom the presumption operates. In either situation, the presumption lives and dies "without the knowledge of the jury, and without affecting the judge's charge in any way."⁸⁰

Purporting to agree with this viewpoint, the Kentucky Court has said that "it is never proper to instruct the jury as to presumptions of law or of fact."⁸¹ Rather than expressing doubt that jurors can properly use presumptions in their deliberations, the reason given by the Court for this ruling is that such instructions would offend "the rule against the court commenting on the evidence and indicating to the jury what weight should be given it."⁸² But once again inconsistency exists between what the Court

⁷⁹ See 9 WIGMORE §§ 249-93; Morgan, *Presumptions*, 12 WASH. L. REV. 254 (1937). A third view of the procedural consequences to be attributed to presumptions should be mentioned at this point because of the manner in which it treats jury instructions on presumptions. It has developed under the guidance of Professor McCormick, and in most respects does not differ from that of Morgan. Recognizing that all presumptions do not owe their existence to the probative strength of the basic facts, McCormick conceived that under some circumstances a presumption should operate to shift to the opponent not only the burden of going forward with the evidence but also the risk of non-persuasion. But when a case involving a presumption is submitted to a jury, the existence of the presumption, according to McCormick, should be mentioned to the jurors so that they "may appreciate the legal recognition of a slant of policy or probability as the reason for placing" on the opponent of the presumption the risk of non-persuasion. McCormick, *What Shall The Trial Judge Tell The Jury About Presumptions?*, 13 WASH. L. REV. 185 (1938). In adopting this viewpoint, McCormick himself acknowledged the great difficulty which jurors would have with presumptions: "The baffling nature of the presumption as a tool for the art of thinking bewilders one who searches for a form of phrasing with which to present the notion to a jury." C. MCCORMICK, *LAW OF EVIDENCE* 669 (1954).

⁸⁰ Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 75 (1933).

⁸¹ *Pacific Mut. Life v. Meade*, 281 Ky. 36, 40, 134 S.W.2d 960, 965 (1939). *Accord*, *Utilities Appliance Co. v. Toon's Adm'r*, 241 Ky. 823, 45 S.W.2d 478 (1932); *Gorman v. Berry*, 289 Ky. 88, 158 S.W.2d 155 (1942); *Ferguson v. Billups*, 244 Ky. 85, 50 S.W.2d 35 (1932); *Mussellam v. Cincinnati, N.O.&T.P.Ry.*, 126 Ky. 500, 104 S.W. 337 (1907); *Henning v. Stevenson*, 118 Ky. 318, 80 S.W. 1135 (1904).

⁸² *Pacific Mut. Life v. Meade*, 281 Ky. 36, 40, 134 S.W.2d 960, 965 (1939). *Accord*, *Tines v. Commonwealth*, 25 Ky. L. Rptr. 1233, 77 S.W. 363 (1903).

of Appeals has said and what it has done. In several instances, instructions to juries as to the existence of presumptions have been given and approved.⁸³ The more important of these will be discussed in the following sections.

B. The Doctrine of *Res Ipsa Loquitur*

Probably the only aspect of this doctrine about which there is no confusion in the Kentucky cases concerns the requirements necessary to invoke its operation. Only where an accident has resulted from the use of an instrumentality and where the following facts are established may *res ipsa loquitur* be applied:

(1) The defendant must have had full management of the instrumentality which caused the injury; (2) the circumstances must be such that, according to common knowledge and the experience of mankind, the accident could not have happened if those having control and management had not been negligent; (3) the plaintiff's injury must have resulted from the accident.⁸⁴

The Court of Appeals has stated, although somewhat inconsistently, that upon proof of these basic facts a "rebuttable presumption [of the defendant's negligence] is raised by the plaintiff and the burden of overcoming that presumption shifts to the defendant."⁸⁵ What this actually means in terms of procedural effect has been the subject of continuing controversy.

The effect attributed to the doctrine by most of the early decisions is represented by the case of *Quillen v. Skaggs*:⁸⁶

The application of this doctrine makes a prima facie case for the plaintiff, so far as negligence is concerned by merely shifting to the defendant the burden of producing evidence on the subject. It merely raises a legal presumption in the plaintiff's favor that [his injuries resulted from the defendant's negligence] This is, of course, a rebuttable presumption, and means no more than that plaintiff is entitled to a favorable

⁸³ See, e.g., *Murrell v. Commonwealth*, 291 Ky. 65, 163 S.W.2d 1 (1942); *Cannon v. Commonwealth*, 243 Ky. 302, 47 S.W.2d 1075 (1932); *Charles v. Commonwealth*, 222 Ky. 99, 300 S.W. 357 (1927); *Mutual Benefit Life Ins. Co. v. Martin*, 108 Ky. 11, 55 S.W. 694 (1900); *Adwell v. Commonwealth*, 56 Ky. 310 (1856).

⁸⁴ *Vernon's Adm'r v. Gentry*, 334 S.W.2d 266, 268 (Ky. 1960). Accord, e.g., *J.C. Penny Co. v. Livingston*, 271 S.W.2d 906 (Ky. 1954).

⁸⁵ *Vernon's Adm'r v. Gentry*, 334 S.W.2d 266, 268 (Ky. 1960).

⁸⁶ 233 Ky. 171, 25 S.W.2d 33 (1930).

finding, unless the defendant introduces evidence to overcome it.⁸⁷

Under this ruling, if the defendant attempted to satisfy his burden and introduced facts and circumstances into the scale against the "basic facts," the trial judge had to measure the sufficiency of all the evidence to determine if a jury issue had been created. If he decided that no reasonable juror could find the existence of negligence, the burden of going forward shifted back to the plaintiff, and required that he introduce more proof, or have his case dismissed.⁸⁸ (The Court has stated on several occasions that a decision like this would be appropriate only if the evidence was of "a conclusive character, undisputed and uncontradicted or show[ed] physical circumstances which reduce[d] the situation almost to a certitude.")⁸⁹ If the judge decided that reasonable jurors could differ as to the existence or nonexistence of negligence, the presumption of negligence vanished and the case was submitted to the jury free of the *res ipsa loquitur* principle. This was consistent with the Thayer-Wigmore general approach to the procedural operation of presumptions.

In later cases, the Court of Appeals expanded the procedural importance of this rule. The case which most clearly sets forth this expansion is *Lewis v. Wolk*:⁹⁰

[T]he doctrine of *res ipsa loquitur* is a rule . . . which compels the court to take judicial notice that the defendant has been negligent, that the plaintiff has established a complete case in his own favor, that the defendant must prove affirmatively, by a preponderance of the evidence, that the defendant was *not negligent*, and that the jury has just one duty to perform, *i.e.*, to find whether or not the defendant *has proved that he was not negligent*.⁹¹ (Emphasis added).

As construed by the Court in this case, the doctrine possessed all of the procedural consequences assigned by the *Quillen* case. It satisfied the plaintiff's initial responsibility of going forward with

⁸⁷ *Id.* at 176, 25 S.W.2d at 35.

⁸⁸ See *Houser v. Coursey*, 310 Ky. 625, 221 S.W.2d 432 (1949); *Cincinnati, N.O. & T.P.Ry. v. Nelson*, 299 Ky. 19, 184 S.W.2d 108 (1944); *Black Mountain Corp. v. Partin's Adm'r*, 234 Ky. 791, 49 S.W.2d 1014 (1932).

⁸⁹ *Crawford v. Alexander*, 259 S.W.2d 476, 478 (Ky. 1953). *Accord*, *Dunning v. Kentucky Util. Co.*, 270 Ky. 44, 109 S.W.2d 6 (1937); *Black Mountain Corp. v. Partin's Adm'r*, 234 Ky. 791, 49 S.W.2d 1014 (1932).

⁹⁰ 312 Ky. 536, 228 S.W.2d 432 (1950).

⁹¹ *Id.* at 539, 228 S.W.2d at 434.

proof on the negligence issue, and at the same time served to shift that responsibility to the defendant. However, it was given one additional function: If the defendant satisfied his burden of producing evidence, but did not introduce enough for a directed verdict against the plaintiff, the issue of negligence had to be submitted to the jury with the defendant bearing the risk of non-persuasion. Consistent with its previous ruling in *Schechter v. Hann*,⁹² *supra*, the Court held that this served to shift the risk of non-persuasion from plaintiff to defendant.

Some indication that the Court of Appeals may never have intended the doctrine of *res ipsa loquitur* to perform the function accorded it in *Schechter* is found in subsequent decisions, one of which is *Kentucky Home Mutual Life Ins. Co. v. Wise*.⁹³ In this case, the Court acknowledged that *res ipsa loquitur* could be given either of the constructions described in the preceding paragraph. It could serve to impose upon the defendant only the burden of going forward with evidence on the negligence issue; or it could serve to shift "the burden of proof entirely over on the defendant to rebut negligence by evidence of greater weight."⁹⁴ The Court further acknowledged that the doctrine could be given a third procedural effect, *i.e.*, "as a permissive inference which would require no directed verdict for the plaintiff in case the defendant failed to offer any evidence in defense."⁹⁵ Under this last construction, proof of the basic facts would serve only to satisfy the plaintiff's initial responsibility of going forward with evidence (achievement of 30 percent probability on Plaintiff's Scale, Figure 1). Discussion of the doctrine was completed with this statement:

When we get right down to practicalities, the procedural theory followed by courts in a given case depends largely on 'the strength of the inference to be drawn, which will vary with the circumstances of the case.'⁹⁶

Since its decision in *Wise*, the Court of Appeals has made two further pronouncements which affect the procedural treatment of *res ipsa loquitur*. With particular application to this "pre-

⁹² 305 Ky. 794, 205 S.W.2d 690 (1947).

⁹³ 364 S.W.2d 338 (Ky. 1961).

⁹⁴ *Id.* at 340.

⁹⁵ *Id.*

⁹⁶ *Id.*

sumption," the Court has reasserted its position that the risk of non-persuasion can never shift.⁹⁷ This limits the procedural consequence of the doctrine to either a permissive inference, as described immediately above, or a presumption which does no more than shift to the defendant the burden of going forward with proof. Secondly, the Court has asserted that whether the doctrine rises to the dignity of this kind of presumption depends in each case upon the natural persuasive force of the "basic facts."⁹⁸ Construed in this manner, the doctrine no more than recognizes "that as a matter of common knowledge and experience the very nature of an occurrence may justify an inference of negligence on the part of the person who controls the instrumentality causing the injury."⁹⁹ And in each case in which it is invoked, the trial judge must gauge the probative force of the basic facts to determine whether or not they are strong enough to "authorize a finding for the plaintiff," or "to require a finding for the plaintiff" if the defendant introduces no proof.¹⁰⁰

Given this interpretation, no benefit is derived from calling *res ipsa loquitur* a presumption. The task which it requires the trial judge to perform is no different from the task which he performs in every case in deciding whether to submit factual issues to a jury for decision. The concept which requires that he do this was described previously as the "burden of going forward with the evidence." Unless the basic facts of the doctrine are construed to require the trial judge to award the plaintiff a directed verdict, absent rebuttal evidence by the defendant, it should be labeled as a "permissive inference," if the need for a label exists. Whether the doctrine merits the consequence of a directed verdict should depend upon the reason conceived for its existence by the Court of Appeals. If, as some authorities say, the reason is simply that an inference of negligence may be drawn from the "basic facts,"¹⁰¹ then it should be treated just as the Kentucky Court presently treats it. However, if the reason for its existence is that evidence

⁹⁷ See *Lee's Adm'r v. Tucker's Adm'r*, 365 S.W.2d 849 (Ky. 1963).

⁹⁸ See *Mix's Ex'r v. Smith*, 387 S.W.2d 1 (Ky. 1965); *Bell & Koch, Inc. v. Stanley*, 375 S.W.2d 696 (Ky. 1964); *Lee's Adm'r v. Tucker's Adm'r*, 365 S.W.2d 849 (Ky. 1963).

⁹⁹ 375 S.W.2d at 697.

¹⁰⁰ See *Mix's Ex'r v. Smith*, 387 S.W.2d 1 (Ky. 1965).

¹⁰¹ See, e.g., W. PROSSER, *LAW OF TORTS* 199-211 (2d ed. 1955).

which will explain the accident is more accessible to the defendant than to the plaintiff, as asserted by other authorities,¹⁰² it merits a greater procedural consequence. Doubt as to the soundness of this latter assertion has relegated the doctrine in most jurisdictions to the procedural significance given it in Kentucky, which is short of that attributed to a "rebuttable presumption."

C. Presumption of Guilt From Possession of Stolen Property

The source of the presumption discussed in this section is Kentucky Revised Statutes [hereinafter referred to as KRS] § 433.290. After creating the criminal offense of knowingly receiving stolen property, this statute provides that "possession by any person of any stolen property shall be prima facie evidence of his guilt under this section." Since the term "prima facie evidence" has been construed in Kentucky to be synonymous with the term "presumption,"¹⁰³ the Court of Appeals has always ruled that possession of stolen property constitutes either "presumptive evidence of guilt"¹⁰⁴ or a "rebuttable presumption of guilt."¹⁰⁵ In attempting to treat this statute as a presumption, the Court has applied it not only to the offense of receiving stolen property but also to the related offense of larceny.

To invoke this presumption, the prosecution must establish two basic facts: (1) That the property in question was stolen; and (2) that at the time of the accused's apprehension it was in his possession.¹⁰⁶ Once these facts are established, the accused is presumed guilty of the offense charged, the effect of which is generally stated in these terms:

[T]he possession of stolen property shifts the burden to the person who has possession of same to make a satisfactory explanation of the circumstances and facts under which the property came into his possession. Stated differently, posses-

¹⁰² See, e.g., *Wilson v. East St. Louis & Interurban Water Co.*, 295 Ill. App. 603, 15 N.E.2d 599 (1938); *Lynch v. Ninemire Packing Co.*, 63 Wash. 423, 115 P. 838 (1911); 9 WIGMORE § 2509.

¹⁰³ See, e.g., *Dudley's Adm'r v. Fidelity & Deposit Co.*, 240 S.W.2d 76 (Ky. 1951); *Gorman v. Berry*, 289 Ky. 88, 158 S.W.2d 155 (1942); *Utilities Appliance Co. v. Toon's Adm'r*, 241 Ky. 823, 45 S.W.2d 478 (1932); *Mussellam v. Cincinnati, N.O. & T.P.Ry.*, 126 Ky. 500, 104 S.W. 337 (1907).

¹⁰⁴ *Davis v. Commonwealth*, 191 Ky. 242, 244, 229 S.W. 1029, 1030 (1921).

¹⁰⁵ *Clatos v. Commonwealth*, 299 Ky. 851, 853, 184 S.W.2d 125, 126 (1945).

¹⁰⁶ E.g., *Clark v. Commonwealth*, 288 Ky. 845, 157 S.W.2d 485 (1941); *Conley v. Commonwealth*, 230 Ky. 391, 20 S.W.2d 75 (1929).

sion of stolen property creates only a rebuttable presumption of guilt rather than a conclusive one.¹⁰⁷

Reference to Figure 4, and the discussion which follows that diagram, will show that the burden shifted to the defendant by this presumption could not possibly be that of going forward with evidence. In all cases, the consequence of not satisfying this responsibility is a directed verdict, and since a verdict can never be directed against an accused who has entered a plea of not guilty, the burden to produce evidence can never be shifted to a criminal defendant. This would seem to leave only the risk of non-persuasion to be affected by the presumption of guilt from possession of stolen property. On occasion, the Court of Appeals has used language indicating that this is the "burden" referred to in the above statement:

The rule is that possession of stolen property shortly after the theft is . . . presumptive evidence of guilt casting upon the accused *the burden of showing his innocence by explaining his possession to the satisfaction of the jury*. . . .¹⁰⁸ (Emphasis added).

Despite this language, in no case has the Court used this presumption to actually shift to an accused the burden of persuading a jury of his innocence. What then are the procedural consequences of the presumption of guilt?

This question was answered in *Tibbs v. Commonwealth*.¹⁰⁹ In that case, the Court of Appeals reviewed past decisions involving this presumption and discovered that in virtually all of them the issue presented on appeal was the sufficiency of evidence to sustain a guilty verdict. The Court then made the following statement:

The opinions, . . . followed a long settled rule in criminal practice to the effect that possession by the accused of stolen property *is not only sufficient to submit the issue of his guilt to the jury under a charge of larceny, but likewise sufficient to sustain a verdict of guilty by the jury*. . . .¹¹⁰ (Emphasis added).

Stated somewhat differently, proof that an accused possessed stolen

¹⁰⁷ *Rogers v. Commonwealth*, 289 Ky. 83, 86, 158 S.W.2d 144, 146 (1942).

¹⁰⁸ *Jacobs v. Commonwealth*, 260 Ky. 142, 144, 84, S.W.2d 1, 2 (1935).
Accord, *Hamm v. Commonwealth*, 270 Ky. 574, 110 S.W.2d 305 (1937).

¹⁰⁹ 273 Ky. 356, 116 S.W.2d 667 (1938).

¹¹⁰ *Id.* at 359, 116 S.W.2d at 669.

property is sufficient only to satisfy the prosecution's initial burden of going forward with evidence (achievement of 50 percent probability, Prosecution's Scale, Figure 4). This construction of the presumption of guilt is consistent with the reason for its existence, which is simply the natural probative connection existing between the "basic facts" and the "presumed fact," as a matter of lay reasoning. On the basis of logic and experience, it is natural to infer that a person possessing stolen property either stole the property or acquired it knowing that it was stolen. Since this inference will still exist even if the defendant introduces rebuttal evidence, and may be weighed by the jury, it should neither be permitted to affect the risk of non-persuasion nor be referred to as a presumption. It performs its intended function not because it is a rule of law but because of the persuasive power of the basic facts. If it must be labeled, then like the doctrine of *res ipsa loquitur*, it should be called a "permissive inference."

D. Presumption of Master-Servant Relationship

In terms of frequency of use, one of the most important presumptions is that which presumes a defendant's employee to have been acting within the scope of his employment at the time of a vehicle accident. Two basic facts must be established to bring this presumption into operation: (1) The vehicle in question must have been owned by the defendant at the time of the accident; and (2) the driver of that vehicle must have been a regular employee of the defendant.¹¹¹ Proof of these facts creates for the plaintiff "a prima facie case that at the time of the accident . . . [the defendant's] agent was acting within the scope of his employment."¹¹² Presenting a prima facie case satisfies the plaintiff's initial responsibility of introducing proof of this proposition and at the same time shifts that responsibility to the defendant.¹¹³ As to this procedural consequence, there is no dispute in any Kentucky case. If the defendant introduces no proof rebutting the presumed fact, the plaintiff is entitled to a peremptory instruction.

¹¹¹ E.g., *Dennes v. Jefferson Meat Mkt., Inc.*, 228 Ky. 164, 14 S.W.2d 408 (1929); *Wood v. Indianapolis Abattoir Co.*, 178 Ky. 188, 198 S.W. 732 (1917).

¹¹² *Galloway Motor Co. v. Huffman's Adm'r*, 281 Ky. 841, 845, 137 S.W.2d 379, 381 (1940).

¹¹³ *Id.*

If such proof is introduced, again the continued procedural operation of the presumption is uncertain.

Most of this uncertainty has been created by a series of cases in which the Court of Appeals has attempted to describe the kind of evidence sufficient to completely overcome this presumption, thereby entitling its opponent to a decision as a matter of law. Evidence sufficient to merit this consequence has been characterized in this way:

[S]uch presumption is overcome when it is met by *uncontradicted and unimpeached evidence* which disproves the presumption and which evidence is in harmony with the facts upon which the presumption is based.¹¹⁴ (Emphasis added).

That which does not overcome the presumption has been described as evidence "of a contradictory and somewhat suspicious nature and [which] does not leave the mind impressed to any high degree with its truth."¹¹⁵ As a result of these principles, virtually every case involving this presumption has developed into an attempt by the Court of Appeals to describe evidence rebutting the presumed fact as either "conclusive and unimpeached," or "contradictory and suspicious." The result has been wasted effort and needless confusion. Absolutely no benefit can be derived from developing a standard of measurement for determining when this presumption has been overcome which is different from the one used to make virtually the same determination in non-presumption cases. In deciding whether any presumption has been successfully rebutted, courts can decide only that either the probability of existence of the presumed fact is such that no reasonable juror could find its existence, that reasonable jurors could differ, or that no reasonable juror could find its nonexistence. This task is not facilitated by standards couched in unintelligible language.

Once the decision has been made that the presumption of agency has not been overcome, *i.e.*, reasonable jurors could differ as to the existence or nonexistence of the presumed fact, there remains the question of what effect it should have upon the risk

¹¹⁴ *Livingston v. Fields*, 311 Ky. 714, 716, 225 S.W.2d 317, 318-19 (1949). *Accord*, *Rawlings v. Clay Motor Co.*, 287 Ky. 604, 154 S.W.2d 711 (1941); *Ashland Coca Cola Bottling Co. v. Ellison*, 252 Ky. 172, 66 S.W.2d 52 (1934).

¹¹⁵ *Home Laundry Co. v. Cook*, 277 Ky. 8, 13, 125 S.W.2d 763, 766 (1939). *Accord*, *Dixie-Ohio Express Co. v. Webb*, 299 Ky. 201, 184 S.W.2d 361 (1944); *Sharp v. Faulkner*, 292 Ky. 179, 166 S.W.2d 62 (1942).

of non-persuasion. The Court of Appeals has decided this question in the following manner:

The burden of establishing agency is on the one asserting its existence. . . . It does not shift. After appellants made out a *prima facie* case [by use of the presumption], the *duty of going forward with the evidence* rested on appellees. When they presented evidence on this question, an issue of fact was created, but the ultimate burden of establishing this fact to the satisfaction of the jury always remained on appellants.¹¹⁶ (Emphasis added).

This construction is consistent with the Court's assertion that the risk of non-persuasion can never shift. But it is not consistent with the reason given for the existence of the presumption of master-servant relationship:

Because it is often impossible for the plaintiff to prove the agency of the operator, it is deemed desirable socially that the burden of introducing evidence on non-agency should be placed upon the defendant in whose peculiar knowledge rests the material evidence essential to a determination of this fact.¹¹⁷

In the interest of a fair determination of this issue, which is probably the most important factor in allocating the risk of non-persuasion,¹¹⁸ it would seem desirable, in situations where this presumption is applicable, to award the plaintiff whatever advantage would accompany an imposition of this risk on the defendant.

E. Presumption of Death From Seven Years Absence

A presumption of death arises upon proof of the following basic facts: (1) That the person whose death is in issue has been absent from his usual place of residence for seven consecutive years; (2) that he has not been heard from by those who, if he were alive, would naturally have information about him; and

¹¹⁶ *Bogner v. Kendle*, 309 Ky. 221, 223-24, 217 S.W.2d 211-12 (1949).

¹¹⁷ *Union Transfer & Storage Co. v. Fryman's Adm'r*, 304 Ky. 422, 426, 200 S.W.2d 953, 954-55 (1947).

¹¹⁸ See James, *Burdens of Proof*, 47 VA. L. REV. 51 (1961).

(3) that his absence has been unexplained.¹¹⁹ Once these facts are proved, "the burden of proof is shifted to the person attacking the presumption to prove that the person claimed to be dead is still alive."¹²⁰ The "burden" referred to in this statement is only that of going forward with the evidence.¹²¹ Since this presumption has been "adopted as a convenient and necessary substitution for proof in order to avoid deadlock in business affairs,"¹²² it should not affect the risk of non-persuasion. Once the deadlock is broken by actual proof rebutting the presumed fact, the presumption has accomplished its purpose and should disappear from consideration, the jury deciding the issue on the basis of that proof.

Two problems have arisen in the application of this principle. The first is similar to a problem discussed in connection with the presumption of master-servant relationship. Under what circumstances is a party against whom the presumption of death operates entitled to a peremptory instruction? In attempting to answer this question, the Court of Appeals has again created a distinction between what it calls "positive, direct, and unimpeached"¹²³ evidence (which overcomes the presumption) and "rumor and unauthenticated"¹²⁴ evidence (which does not overcome the presumption). These standards of measurement are like all of the others which have been used to pass upon the sufficiency of proof. They do not convey to anyone the degree of belief essential to the creation of a jury issue. Furthermore, as stated in the preceding section, there is simply no need for special standards of measurement for passing upon motions for directed verdicts where presumptions are involved. The trial judge need only decide whether the opponent of the presumption has introduced enough proof to convince him

¹¹⁹ *E.g.*, *Jefferson Standard Life Ins. Co. v. Hewlett*, 307 Ky. 171, 210 S.W.2d 352 (1948); *Commonwealth Life Ins. Co. v. Caudill's Adm'r*, 266 Ky. 581, 99 S.W.2d 745 (1936); *Modern Woodmen of America v. Hurford*, 193 Ky. 50, 235 S.W. 24 (1921).

¹²⁰ *Duncan v. Clore*, 189 Ky. 132, 135, 224 S.W. 678, 680 (1920).

¹²¹ *See, e.g.*, *Modern Woodmen of America v. Hurford*, 193 Ky. 50, 235 S.W. 24 (1921); *Mutual Benefit Life Ins. Co. v. Martin*, 108 Ky. 11, 55 S.W. 694 (1900).

¹²² *Columbia Life Ins. Co. v. Perry's Adm'r*, 252 Ky. 793, 796, 68 S.W.2d 393, 394 (1934).

¹²³ *Id. Accord*, *Commonwealth Life Ins. Co. v. Wood's Adm'r*, 263 Ky. 361, 92 S.W.2d 351 (1936).

¹²⁴ *Id. Accord*, *Metropolitan Life Ins. Co. v. Edelen's Ex'r*, 308 Ky. 455, 214 S.W.2d 769 (1948); *Commonwealth Life Ins. Co. v. Caudill's Adm'r*, 266 Ky. 581, 99 S.W.2d 745 (1936).

that no reasonable juror could find the existence of the presumed fact.

The second problem that has arisen in applying this presumption concerns jury instructions. Its source is the case of *Mutual Benefit Life Ins. Co. v. Martin*.¹²⁵ In this case the Court of Appeals ruled that juries should be instructed that this presumption exists and should be considered along with the evidence in deciding the death issue. The manner in which juries were to weigh this principle of law against evidence was not mentioned. The Court may have intended only that the persuasive force of the basic facts be weighed against the evidence tending to disprove the presumed fact. But since the jury could be expected to do this without mention of the presumption, more must have been intended. The unsoundness of an instruction such as this is supported by the Court of Appeals' subsequent action. Although the *Martin* case has not been expressly overruled, none of the more recent cases provide for an instruction on the presumption of death.¹²⁶ At least one case has indicated by implication that such an instruction would be improper.¹²⁷

F. Presumption That A Properly Mailed Letter Is Received in Due Course

By showing that a communication was properly addressed, stamped, and deposited in the mail, a party may invoke a presumption that the addressee received the communication in due course.¹²⁸ In a typical imprecise manner, the Court of Appeals has described the procedural operation of this presumption as follows:

If . . . [the basic facts] are proved the presumption will arise, with the burden cast on the sendee to prove that he never received the communication, or the information that it contained from any authorized source.¹²⁹

¹²⁵ 108 Ky. 11, 55 S.W. 694 (1900).

¹²⁶ See, e.g., *Jefferson Standard Life Ins. Co. v. Hewlett*, 307 Ky. 171, 210 S.W.2d 352 (1948); *Hill's Adm'x v. Metropolitan Life Ins. Co.*, 240 Ky. 172, 41 S.W.2d 935 (1931); *Mutual Life Ins. Co. v. Louisville Trust Co.*, 207 Ky. 654, 269 S.W. 1014 (1925).

¹²⁷ *Pacific Mut. Ins. Co. v. Meade*, 281 Ky. 36, 134 S.W.2d 960 (1939).

¹²⁸ See, e.g., *Commonwealth Life Ins. Co. v. Gault's Adm'rs*, 256 Ky. 625, 76 S.W.2d 618 (1934); *Proctor v. Ray*, 194 Ky. 746, 240 S.W. 1063 (1922).

¹²⁹ *Executive Comm. of Christian Educ. and Ministerial Relief for the Presbyterian Church of the United States v. Fidelity & Columbia Trust Co.*, 273 Ky. 715, 720, 117 S.W.2d 958, 960 (1938). *Accord*, *Benefit Ass'n of Ry. Employees v. Hancock*, 248 Ky. 315, 58 S.W.2d 578 (1933).

As stated before, the reason behind this presumption is solely the balance of probability in favor of the presumed fact which flows naturally from the basic facts. Since this probability may be properly assessed by a jury along with the rebuttal evidence, this presumption should impose upon its opponent only the burden of going forward with evidence. It is this "burden" which is referred to in the above statement.

The difficulty experienced with this presumption in Kentucky has occurred when its opponent has attempted to satisfy the burden shifted to him by offering nothing more than his own denial of receipt of the communication. On several occasions, the Court of Appeals has described the effect of such a rebuttal to be this:

[W]here there was a denial that a letter was received, and the mailing of the letter is the only evidence of service, the party upon whom the burden is cast of showing that a notice was given must fail of his proof.¹³⁰

Under this ruling, denial of the existence of the presumed fact by the opponent serves to satisfy his burden of going forward with proof as well as to shift that burden back to the proponent of the presumption. The difficulty of conceiving a situation in which the presumption would be invoked in the absence of a denial of receipt by the opposing party casts doubt upon the soundness of this ruling. If a simple denial is sufficient to completely overcome the presumption, then in effect, it performs no procedural function at all. (It would not even achieve what is designated on Figure 1 as the 30 percent probability level.)

In its more recent decisions, the Court of Appeals has assigned this presumption a greater procedural importance:

According to the weight of authority, the rule is that when it is shown that a letter has been properly mailed to a person, the presumption is that the addressee received such letter, and if he denies having received same such denial does not entirely destroy such presumption, and it may be considered as evidence by the court or jury trying the case.¹³¹

¹³⁰ *Home Ins. Co. v. Roll*, 187 Ky. 31, 35, 218 S.W. 471, 473 (1920). *Accord*, *Campbell v. Snyder*, 287 Ky. 596, 154 S.W.2d 724 (1941); *H. C. Whitmer Co. v. McClung*, 247 Ky. 625, 57 S.W.2d 648 (1933); *Benge's Adm'r v. Eversole*, 156 Ky. 131, 160 S.W. 911 (1913).

¹³¹ *Meyers v. Brown-Forman Distillery Co.*, 289 Ky. 185, 195, 158 S.W.2d 407, 412 (1942). *Accord*, *Beauchamp v. Commonwealth ex. rel. Ky. Bd. of Veterinary Examiners*, 243 S.W.2d 879 (Ky. 1951).

With this interpretation, the opponent's denial of receipt satisfies his burden of going forward with evidence but does not shift that burden back to the proponent of the presumption. A jury issue is created with the proponent having the risk of non-persuasion. This treatment is consistent with the interpretation of this presumption in most jurisdictions.

G. Presumptions Without Basic Facts

Several principles of legal presumptions cannot be made to fit neatly into the definition of a presumption provided above because the presumed fact arises from a "situation" rather than from "proved facts." The most important of these principles are the presumption of innocence, the presumption of sanity, and the presumption against suicide. The procedural consequence accorded these presumptions merits brief consideration.

1. *Presumption of Innocence.*—When an accused makes his initial appearance in a courtroom he arrives under a cloud of suspicion¹³² and faces the unappealing task of defending himself against the power and resources of the state. Because of this "situation," the law has perceived a need to cloak him with a presumption of innocence which, being a presumption, should in its procedural operation relate to the burden of proof concept. This, however, is not possible. Both responsibilities of this concept are imposed upon the prosecution independent of the operation of the presumption of innocence. From the instant that an accused is charged with criminal conduct, the state must bear the responsibility of going forward with evidence on the question of guilt, and in the end must bear the risk of non-persuasion. Consequently, the only function left for the presumption of innocence, once a case is ready for trial, is to serve as a caution to the decision-makers that an accused should not suffer from "suspicion, conjection, and mere appearances,"¹³³ and that guilt should not be inferred from his arrest and indictment. Very few courts have confined its procedural consequences to the per-

¹³² The actual existence of this suspicion has been established by laboratory experimentation. An experiment performed by two psychologists verified that "the mere indictment created a slight tendency to regard the defendant as guilty." Weld & Roff, *A Study in the Formation of Opinion Based Upon Legal Evidence*, 51 AM. J. OF PSYCHOL. 609, 622 (1938).

¹³³ P. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 313-52 (1898).

formance of this task.¹³⁴ Instead, most have chosen to give it some special functional value which requires that it be submitted in some manner to the jury for consideration along with the evidence. Efforts to describe this value have resulted in a great number of confusing and uncertain judicial decisions.

Probably the most important of these is the Supreme Court case of *Coffin v. United States*.¹³⁵ At the trial level, the judge construed the presumption of innocence to be the reason for, or synonymous with, the principle which imposes upon the prosecution the risk of non-persuasion.¹³⁶ Thus, he instructed the jury that the prosecution was obligated to establish guilt beyond a reasonable doubt, but refused to specifically mention the presumption of innocence.¹³⁷ In rejecting this construction, the Supreme Court conceived the presumption to be an "instrument of proof created by the law in favor of one accused,"¹³⁸ and decided that the jury should be instructed that this instrument is a part of the evidence for the accused and must be considered as such in deciding the question of guilt or innocence.¹³⁹ With this decision, the Court apparently intended that the presumption be an arbitrary determination that the accused was probably innocent and that this determination in some manner be placed in the imaginary scales of justice to be weighed with the evidence. Two years later, the Supreme Court altered the *Coffin* decision, but only with respect to its ruling that the jury should be instructed that the presumption of innocence is evidence. It was thought that this instruction

¹³⁴ See, e.g., *Kindle v. State*, 174 Ark. 1179, 297 S.W. 827 (1927); *Monk v. State*, 130 Ark. 364, 197 S.W. 580 (1917); *McKenna v. State*, 119 Fla. 588, 161 So. 561, 564 (1934) (*concurring opinion*); *Swango v. Commonwealth*, 291 Ky. 690, 165 S.W.2d 182 (1942); *Commonwealth v. Devlin*, 335 Mass. 55, 141 N.E.2d 269 (1957); *Carr v. State*, 192 Miss. 152, 4 So. 887 (1941); *State v. Lizotte*, 109 Vt. 378, 197 A. 396 (1938).

¹³⁵ 156 U.S. 432 (1895).

¹³⁶ Professor Wigmore's analysis of the presumption of innocence was similar to that of the trial judge in the *Coffin* case. He concluded that this presumption "is in truth merely another form of expression for . . . the rule that it is for the prosecution to adduce evidence . . . and to produce persuasion beyond a reasonable doubt." 9 WIGMORE § 2511.

¹³⁷ The instruction refused by the trial judge was framed as follows:

The law presumes that persons charged with crime are innocent until they are proven by competent evidence to be guilty. To the benefit of this presumption the defendants are all entitled, and this presumption stands as their sufficient protection unless it has been removed by evidence proving their guilt beyond a reasonable doubt.

Coffin v. United States, 156 U.S. 432, 452 (1895).

¹³⁸ *Id.* at 459.

¹³⁹ *Id.* at 461.

tended to mislead.¹⁴⁰ The Court, however, maintained its position that the presumption does more than merely reemphasize that the burden of proof is on the prosecution. It was still thought to be "an instrument of proof."¹⁴¹

With this reasoning as a foundation, the federal courts have developed two principles to govern the procedural operation of this presumption. The first requires that the presumption attend the accused throughout the trial, without regard to the persuasiveness of the evidence contrary to the presumed fact.¹⁴² The second requires that, in deciding the issue of guilt or innocence, jurors must consider the presumption along with the evidence and weigh the evidence in light of it.¹⁴³ State courts, with few exceptions,¹⁴⁴ have adopted the reasoning of the Supreme Court, and have treated the presumption of innocence as something entirely distinct from the principle which requires the prosecution to establish guilt.¹⁴⁵ The Court of Appeals of Kentucky is one of the exceptions. Its treatment of the presumption of innocence has been described in this way:

While this instruction [*i.e.*, that the 'law presumes the defendant to be innocent until proven guilty'] fairly

¹⁴⁰ See *Agnew v. United States*, 165 U.S. 36 (1897). In referring to an instruction that the presumption of innocence must be considered as evidence for the accused, the Supreme Court remarked that "the [trial court] might well have declined to give it, on the ground of the tendency of its closing sentence to mislead." *Id.* at 52. In a subsequent case, *Holt v. United States*, 218 U.S. 245 (1910), the Court made its position more definite, and it is now well recognized in federal courts that an instruction that the presumption of innocence is evidence is not required. See, *e.g.*, *Harrell v. United States*, 220 F.2d 516 (5th Cir. 1955); *United States v. Nimerick*, 118 F.2d 464 (2d Cir. 1941).

¹⁴¹ *Kirby v. United States*, 174 U.S. 47, 55 (1899).

¹⁴² *United States v. Fleischman*, 339 U.S. 349 (1950); *Kirby v. United States*, 174 U.S. 47 (1899); *Pannell v. United States*, 230 F.2d 698 (D.C. Cir. 1963); *Shaw v. United States*, 244 F.2d 930 (9th Cir. 1957); *Curley v. United States*, 160 F.2d 229 (D.C. Cir. 1946); *United States v. Foster*, 9 F.R.D. 367 (S.D.N.Y. 1949).

¹⁴³ *E.g.*, *McAfee v. United States*, 105 F.2d 21 (D.C. Cir. 1939); *Miklencic v. United States*, 62 F.2d 1045 (3d Cir. 1933); *Lisansky v. United States*, 31 F.2d 846 (4th Cir. 1929); *Dodson v. United States*, 23 F.2d 401 (4th Cir. 1928); *United States v. Foster*, 9 F.R.D., 367 (S.D.N.Y. 1949).

¹⁴⁴ See, *e.g.*, *State v. Hayes*, 127 Conn. 543, 18 A.2d 895 (1941); *State v. Gardner*, 112 Conn. 121, 151 A. 349 (1930); *State v. Demag*, 118 Vt. 273, 108 A.2d 390 (1954).

¹⁴⁵ See, *e.g.*, *Robertson v. State*, 36 Ala. App. 117, 53 So. 2d 575, (1951); *Davis v. State*, 90 So. 2d 629 (Fla. 1956); *People v. Coulson*, 12 Ill. 2d 290, 149 N.E.2d 96 (1958); *Osborn v. State*, 199 Ind. 44, 154 N.E. 865 (1927); *State v. Harvey*, 228 N.C. 62, 44 S.E.2d 472 (1947).

presents the law, it is more favorable to the defendant than he was entitled to have. This instruction should always follow . . . these words:
* * * *

'If there be a reasonable doubt of the defendant being proven to be guilty, he is entitled to an acquittal.'
* * * *

The court should not tell the jury that the law presumes the innocence of a defendant.¹⁴⁶

The reason for this type of instruction has never been clearly expressed. But, from this statement and others like it,¹⁴⁷ one easily concludes that the Court conceives the presumption of innocence to be synonymous with the principle which requires the prosecution to establish guilt beyond a reasonable doubt. On other occasions, however, the Court has given a different reason for not instructing the jury as to the existence of this presumption. It has stated that such an instruction would violate the prohibition against comment on the value of evidence by the judge.¹⁴⁸ Whatever the reason, the Kentucky Court's interpretation is consistent with the classification of this principle as a "rebuttable presumption"¹⁴⁹ and with the reasoning of Wigmore and Morgan that the untrained mind of a juror is not capable of accurately applying any presumption to the judgment process.

2. *Presumption of Sanity*.—The presumption of sanity is another of the presumptions which may be used in the absence of "proved facts." It may be invoked in a civil or criminal case as soon as an issue of insanity is raised. The reason for its existence usually has been asserted to be a balance of probability in favor of the presumed fact. On occasion another reason has been suggested:

The plea of insanity is peculiarly open to abuse. It is often resorted to in extremity. It opens a wide range of inquiry. Facts to support are easily manufactured. It invites the jury

¹⁴⁶ *Brown v. Commonwealth*, 198 Ky. 663, 664-65, 249 S.W. 777, 778 (1923).

¹⁴⁷ See, e.g., *Pack v. Commonwealth*, 287 Ky. 192, 152 S.W. 600 (1941); *Nickells v. Commonwealth*, 241 Ky. 159, 43 S.W.2d 697 (1931); *Keith v. Commonwealth*, 195 Ky. 635, 243 S.W. 293 (1922).

¹⁴⁸ *Goodwin v. Commonwealth*, 214 Ky. 422, 283 S.W. 420 (1926); *Minniard v. Commonwealth*, 158 Ky. 210, 164 S.W. 804 (1914).

¹⁴⁹ E.g., *Bradford v. United States*, 129 F.2d 274 (5th Cir. 1942); Morgan, *Presumptions*, 12 WASH. L. REV. 254 (1937); Subrin, *Presumptions and Their Treatment Under the Law of Ohio*, 26 OHIO ST. L.J. 175 (1965).

into a field of speculation, where they are likely, by means of conflicting expert testimony and opposing and uncertain opinions, to become lost in doubt and confusion, and their verdict often a matter of mere conjecture.¹⁵⁰

For one or both of these reasons, courts have decided that the decision-maker whose mind is in equipoise should "be required to find for the usual rather than the unusual."¹⁵¹ (Sanity is deemed the usual, insanity the unusual.) This has been achieved by presuming every man sane until the contrary is shown and by using this presumption to "place the burden of showing insanity upon the party who relies upon it"¹⁵² as a matter of defense.

In civil cases the Court of Appeals has experienced no difficulty with this presumption. It has been used to shift the two responsibilities of the burden of proof concept to the party who pleads insanity as an element of his case.¹⁵³ In criminal cases its application has been more difficult because the situation is the same as that which exists with the presumption of innocence. Both the burden of going forward with evidence and the risk of non-persuasion are imposed upon an accused independent of the presumption of sanity. In allocating the burden of proof in criminal cases, the Court of Appeals has always held that if an accused relies upon some separate matter of defense "wholly disconnected from the body of the particular offense charged, and constituting a distinct affirmative defense," he must bear the burden of establishing that defense.¹⁵⁴ Insanity is one of those classified as a "distinct affirmative defense."¹⁵⁵ This classification has made it impossible for the presumption of sanity to affect the burden of proof responsibilities, and has resulted in the Court treating this presumption as no other is treated.

Without distinguishing its principle that juries should never be instructed as to presumptions, the Court of Appeals has con-

¹⁵⁰ *Cannon v. Commonwealth*, 243 Ky. 302, 310, 47 S.W.2d 1075, 1078 (1932).

¹⁵¹ *Morgan, Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906 (1931).

¹⁵² *Cannon v. Commonwealth*, 243 Ky. 302, 310, 47 S.W.2d 1075, 1078 (1932).

¹⁵³ *E.g.*, *Nagle v. Wakefield's Adm'r*, 263 S.W.2d 127 (Ky. 1953).

¹⁵⁴ *Commonwealth v. Gentry*, 261 Ky. 264, 564, 566, 88 S.W.2d 273, 274 (1935). *Accord*, *Phillips v. Commonwealth*, 248 Ky. 665, 59 S.W.2d 579 (1933); *Ball v. Commonwealth*, 81 Ky. 662 (1884).

¹⁵⁵ *E.g.*, *Tunget v. Commonwealth*, 303 Ky. 834, 198 S.W.2d 785 (1946); *Gulley v. Commonwealth*, 284 Ky. 98, 143 S.W.2d 1059 (1940); *Ball v. Commonwealth*, 81 Ky. 662 (1884).

sistently approved instructions in criminal cases which state that "every man is presumed sane until the contrary is shown."¹⁵⁶ This is the only presumption presently presented to juries in Kentucky. By approving such instructions, the Court is apparently attempting to "implement the policy behind the presumption by inviting the jury to weigh it, in some manner not easy to understand or articulate, as they would a part of the evidence."¹⁵⁷ The fault with such instructions is in their redundancy. The policy of the presumption is implemented through the imposition upon the accused of the burden of proof on the insanity issue. It has no other function to perform, certainly not one which requires jurors to undertake the difficult psychological task of weighing a creation of the law on the same scales in which they weigh evidence.

3. *Presumption Against Suicide.*—This presumption, like that of sanity, is based upon a balance of probability in favor of the presumed fact. Absent evidence to the contrary, we know that "a person possesses a love of life, and the instinct to preserve it,"¹⁵⁸ and that he will not voluntarily do anything that imperils his own life. Despite the identical reason for their existence, the presumption of sanity (as applied in civil cases) and the presumption against suicide are accorded different procedural treatment. The former serves to shift both responsibilities of the burden of proof concept to its opponent while the latter serves to shift only the burden of going forward with the evidence.¹⁵⁹ Once this burden is satisfied by the opponent, the presumption against suicide disappears from the case with the proponent having the responsibility of persuading the jury as to the occurrence of suicide. Perhaps this distinction is justified by the difference that exists in the issues upon which the two presumptions operate. Although both "suicide" and "insanity" issues involve the state of a person's mind, the suicide issue is more susceptible of proof from external circumstances and, therefore, easier to prove.

¹⁵⁶ *E.g.*, *Terry v. Commonwealth*, 371 S.W.2d 862 (Ky. 1963); *Murrell v. Commonwealth*, 281 Ky. 65, 163 S.W.2d 1 (1942); *Mathley v. Commonwealth*, 120 Ky. 389, 86 S.W. 988 (1905).

¹⁵⁷ *James, Burdens of Proof*, 47 VA. L. REV. 51 (1961).

¹⁵⁸ *Kentucky Home Mut. Life Ins. Co. v. Watts*, 298 Ky. 471, 475, 183 S.W.2d 499, 501 (1944). *Accord*, *Illinois C.R. v. Applegate's Adm'r*, 268 Ky. 458, 105 S.W.2d 153 (1936); *Owen Motor Freight Lines v. Russell's Adm'r*, 260 Ky. 795, 86 S.W.2d 708 (1935).

¹⁵⁹ *Thelen v. Mutual Life Ins. Co.*, 261 S.W.2d 427 (Ky. 1953); *Kentucky Home Mut. Life Ins. Co. v. Watts*, 298 Ky. 471, 183 S.W.2d 499 (1944).

V. CONCLUSION

Writers with sufficient patience to undertake a discussion of the law of presumptions have generally begun or concluded with an apologetic statement which sounds something like this: "Every writer of sufficient intelligence to appreciate the difficulties of the subject matter has approached the topic of presumptions with a sense of hopelessness and has left it with a feeling of despair."¹⁶⁰ A discussion of the Kentucky law of presumptions cannot be concluded with a different "feeling." It seems appropriate, therefore, to finish by demonstrating the need for such an apology. In Kentucky, the recent case of *Lee v. Tucker*¹⁶¹ provides that demonstration. This case involved a traffic accident in which both occupants of a car were killed when that car crossed into the wrong lane of a highway and collided with a truck. The personal representative of the owner of the car was sued by the personal representative of the other occupant, who happened to be the owner's daughter. The claim was for wrongful death, and the only issue in the case was whether the owner or his daughter was driving at the time of the accident.

As a consequence of the impact of the vehicles, both occupants of the car had been thrown out the right front door, and no witness could testify as to who was driving at the time of the collision. Each had been observed driving on the day in question, the owner nearest in time to the accident. The only other proof offered on this issue was that the owner had a heart condition and that the daughter frequently drove the vehicle when the two were together. On the basis of this evidence, the case was submitted to the jury with a special interrogatory requiring that the jury state whether they could decide who was driving the vehicle at the time of collision. When this interrogatory was answered in the negative, the trial court dismissed the plaintiff's claim. On appeal, the question presented for decision was whether the plaintiff's evidence (ownership of the vehicle plus the testimony that the owner was the one last seen driving prior to the collision) created a

¹⁶⁰ Morgan, *Presumptions*, 12 WASH. L. REV. 255 (1937). Accord, Subrin, *Presumptions and Their Treatment Under the Law of Ohio*, 26 OHIO ST. L.J. 175 (1965). See Laughlin, *In Support of The Thayer Theory of Presumptions*, 52 MICH. L. REV. 195 (1953); Reaugh, *Presumptions and the Burden of Proof*, 36 ILL. L. REV. 703 (1942).

¹⁶¹ 365 S.W.2d 849 (Ky. 1963).

"presumption" which served to shift to the defendant the burden of proof (meaning by this the risk of non-persuasion) on the issue of identity. If so, the jury's answer to the interrogatory would have compelled a verdict for the plaintiff.

In approving the trial courts decision, the Court of Appeals first distinguished what it conceived to be the two major legal concepts involved, "permissible inference" and "rebuttable presumption":

The terms 'inference' and 'presumption' are merely descriptive of the weight given to circumstantial evidence as a matter of law in particular instances. *The legal effect given to any evidence should and usually does depend on the degree of probability reflected by it. If it is accorded the dignity of a presumption it should not be because a wooden rule puts it in that category, but only because it is that persuasive. . . .* Circumstantial evidence has no magic quality. It is measured by the same standards of probity and credibility as direct evidence.¹⁶² (Emphasis added).

With this statement, and others which followed it, the Court indicated quite clearly that in its collective judgment, the only difference between an inference and a presumption is that the latter represents a greater persuasive force of circumstantial evidence than the former. The Court further indicated that *any* set of circumstances in *any* case could create a presumption if the court should decide that those circumstances have the necessary persuasive power. Any doubt as to the Court's intention in respect to these two conclusions was eliminated by what was described as the "holding" of the case:

We hold that when the probative force of a plaintiff's evidence is such that in the absence of further proof he is entitled to a directed verdict . . ., he has established a rebuttable presumption. This places on the defendant the practical necessity (which, to avoid confusion, ought not to be referred to as a 'burden') of going forward with proof if he would avoid a preemptory, but it does not shift the burden of proof in the sense that he loses if the jury cannot decide the issue one way or the other. His rebutting evidence will reduce the presumption to the status of a permissible inference if it injects enough doubt that the jury may reasonably decide that the plaintiff has not proved his case.¹⁶³

¹⁶² *Id.* at 851.

¹⁶³ *Id.* at 852.

This case is not unique in its misuse of the term "presumption," except in one sense. There was simply no need to use or misuse the "presumption" concept in this situation. The Court needed only to decide which party should bear the risk of non-persuasion on the identity issue. By involving the "presumption" device in the decision, the Court of Appeals added to the already confused state of the law in several ways. Most significantly perhaps, the Court disregarded the need to confine the use of the term "presumption" to those well-defined, often-used, principles of law which attach to *specific evidentiary facts* (known as "basic facts") *specific procedural consequences* as to the production of other evidence. Also the Court has restated its position, which is not even consistent with its own past decisions, that all presumptions are based in policy upon the persuasive force of their basic facts, not upon "a wooden rule." And, finally, the Court has bestowed upon the term "rebuttable presumption" a function that has always been performed adequately by the "burden of going forward with evidence," *viz.*, to allocate to one of the litigants, under threat of an adverse ruling, the responsibility of producing evidence on the propositions in issue. It is too much to expect that this article would eliminate the confusion represented by the case of *Lee v. Tucker*. If it does not add to this confusion, then possibly a useful step has been taken.